

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREGORY BENDER,

Plaintiff,

v.

NOKIA INC.,

Defendant.

No. C-09-1247 MMC

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT NOKIA  
INC'S MOTION TO DISMISS AMENDED  
COMPLAINT; CONTINUING  
OCTOBER 23, 2009 CASE  
MANAGEMENT CONFERENCE TO  
DECEMBER 4, 2009**

Before the Court is defendant Nokia Inc.'s ("Nokia") "Motion to Dismiss Gregory Bender's Amended Complaint for Failure to State a Claim," filed August 21, 2009. Plaintiff Gregory Bender has filed opposition, to which defendant has replied.<sup>1</sup> Having read and considered the papers submitted in support of and in opposition to the motion, the Court rules as follows.

1. To the extent defendant seeks dismissal of plaintiff's claim of direct infringement for failure to provide sufficient notice of the accused products,<sup>2</sup> the motion will be denied because the claim is pled in conformity with the Federal Rules of Civil Procedure, Appendix of Forms. See Fed. R. Civ. P. Form 18; McZeal v. Sprint Nextel Corp., 501 F.3d 1354,

<sup>1</sup> By Order filed September 18, 2009, the hearing on said motion was vacated.

<sup>2</sup> The complaint includes one cause of action, titled "Infringement of the '188 Patent" (referring to U.S. Patent Number 5,103,188), in which plaintiff alleges claims for direct infringement and inducement infringement.

1 1356-58 (Fed. Cir. 2007) (holding claim of direct infringement alleged in conformity with  
2 forms appended to Rule 84 provides defendant sufficient notice of claim and survives  
3 motion to dismiss for failure to state claim). Specifically, the complaint, in conformity with  
4 Form 18, alleges defendant has infringed plaintiff's patent "by making, using, offering for  
5 sale, and/or selling products that consist of, comprise, and/or contain at least one circuit,  
6 silicon or otherwise, which contains and/or utilizes at least one buffered transconductance  
7 amplifier," after which the complaint lists the various types of products, e.g., "cell phones,"  
8 "DSL modems," that are alleged to contain such patented invention. (See Compl. ¶ 8);<sup>3</sup>  
9 Fed. R. Civ. P. Form 18 (providing, as example of claim alleging infringement of patent for  
10 electric motor, "defendant has infringed and is still infringing the [p]atent by making, selling,  
11 and using electric motors that embody the patented invention").

12 2. To the extent defendant seeks dismissal of the complaint for failure to allege  
13 infringing activity within the United States, the motion will be granted.<sup>4</sup>

14 3. To the extent defendant seeks dismissal of plaintiff's claim for inducement of  
15 infringement, the motion will be granted. The only factual allegation in support of such  
16 claim is that defendant sold infringing products. (See Compl. ¶ 8.) Although plaintiff, in  
17 conclusory terms, alleges defendant "induce[d] others to infringe" (see id.), plaintiff fails to  
18 allege that any such third party has itself made, used, offered to sell, or sold an infringing  
19 product. See Hoechst-Roussel Pharmaceuticals, Inc. v. Lehman, 109 F.3d 756, 759 (Fed.  
20 Cir. 1997) ("Direct infringement consists of making, using, offering to sell, or selling the  
21 invention defined by the claims of a patent, without the authority of the patent owner."); Joy

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23 <sup>3</sup> To the extent plaintiff seeks to expand the scope of the complaint "without  
24 limitation" (see id.), plaintiff, pursuant to the Local Rules of this District, will be required to  
provide a more particularized showing. See, e.g., Patent Local Rule 3-1.

25 <sup>4</sup> As noted, the Federal Circuit has held that a complaint pleaded in conformity with  
26 Form 18 is sufficient to avoid dismissal for failure to state a claim. See McZeal, 501 F.3d at  
27 1356-58. Form 18 does not require an allegation of activity in the United States. See Fed.  
28 R. Civ. P. Form 18. Nevertheless, because the occurrence of the infringing act(s) in the  
United States "is an element of [a] claim for patent infringement," see Litecubes, LLC v.  
Northern Light Products, Inc., 523 F.3d 1253, 1366 n. 14 (Fed. Cir. 2008), plaintiff will be  
required to include in his complaint the allegation that the infringing acts occurred in the  
United States.

1 Technologies, Inc. v. Flakt, Inc., 6 F.3d 770, 774 (Fed. Cir. 1993) (“Liability for either active  
2 inducement of infringement or for contributory infringement is dependent upon the  
3 existence of direct infringement [by third party].”).

4 **CONCLUSION**

5 For the reasons stated above, defendant’s motion to dismiss is hereby GRANTED in  
6 part and DENIED in part, as follows:

7 1. To the extent the motion seeks dismissal of the complaint for failure to allege  
8 infringement in the United States, and dismissal of plaintiff’s claim for inducement of  
9 infringement, the motion is GRANTED.


10 2. In all other respects, the motion is DENIED.

11 3. No later than October 23, 2009, plaintiff may file a Second Amended Complaint  
12 for purposes of curing the deficiencies identified above.<sup>5</sup>

13 4. The Case Management Conference is CONTINUED to December 4, 2009.

14 **IT IS SO ORDERED.**

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16 Dated: October 2, 2009

  
MAXINE M. CHESNEY  
United States District Judge

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27 <sup>5</sup> Although plaintiff in connection with his opposition submitted a proposed Second  
28 Amended Complaint, defendant argues such complaint is deficient as well. The Court does  
not address those arguments herein. The Court notes, however, that its Order granting  
leave to amend is not intended to limit plaintiff to the pleading proposed in connection with  
the instant motion.